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No. 81-1922

In the Supreme Court of the United States

October Term, 1981

CITIES SERVICE GAS COMPANY,
CITIES SERVICE CRYOGENICS, INC.,
CITIES SERVICE HELEX,
Petitioners,

vs.

MOBIL OIL CORPORATION, et al.,

and

RALPH GROUNDS, et al.,
Respondents,

vs.

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN RESPONSE TO BRIEFS IN OPPOSITION AND MEMORANDUM FOR THE UNITED STATES

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STATEMENT

Certain statements and arguments made in the several briefs in opposition may lead to confusion and we believe a brief clarification may be helpful to the Court. However,

most of the confusion generated in this case can be dispelled by a reading of the Kansas trial court's exhaustive and carefully written opinions, both of which were written after months and weeks of hearing testimony, examining thousands of documents and poring over reams of briefs submitted by the various parties. (J.A. A170, A28)

ARGUMENT

Brief of Mobil, et al.

A statement is made by Mobil that the court of appeals in *Grounds I* held that title failed for failure to pay for the helium. While there is a statement to that effect, there is also a statement in that case that legal title to the helium constituent in the gas stream passed to the purchasers under the gas sales contracts. The Court should not be deceived into believing that the helium constituent was not paid for under the gas purchase contracts. The helium constituent in the gas stream turned the meters the same as the other gas constituents and it was all paid for under the gas purchase contracts at the price agreed upon by the parties in arm-length negotiations. Admittedly there were instances in which the full contract rate could not be paid because of FPC regulation under the Natural Gas Act, 15 U.S.C. 717, et seq. But, there were hundreds of instances where the full contract price was the same as or less than the FPC allowed rate and the sellers received every penny they bargained for. In those instances where the rate was less than the contract price, petitioners owe the difference between the rate paid and the contract price for the 0.43% of the helium constituent. But, there exists no reason why the contract price for all of the constituents should not control because this is precisely what the parties agreed to. As

Judge Brown in the initial trial pointed out, the parties were free to negotiate a separate price for the helium constituent and nothing in the Helium Act Amendments of 1960, 50 U.S.C. 167, et seq. prevented the parties from doing exactly that. In fact, this is precisely what Kansas-Nebraska did in approximately 25 contracts it negotiated along in 1963 to 1965 when it contemplated the construction of a helium extraction facility. (J.A. A85)

The Kansas trial court did find there were comparable sales for helium notwithstanding the statement in Mobil's brief to the contrary. A reading of the trial court's opinion will clearly demonstrate this. (J.A. A28) As to the statement that the Helex Group and the government considered the value of helium to be at least $2.00 which was proved by the lessee-producer group, such contention was not even advanced to the trial court and obviously since that court's finding of value was between $.60 and $.70, a minimum value of $2.00 was not proved.

Brief of Amoco, et al.

Again, these parties tend to confuse the issues by making reference to facts about the minimum value of helium which were presented and argued at length before the trial court but which were not accepted by the trier of the fact. The gratuitous statement in the conclusion of this brief that the petitioning helium extractors continue to profit by millions of dollars each year is the precise kind of fact that the trial court found unbelievable although the trial court looked at our profits carefully. (J.A. A54)

Brief of Gulf Oil Corporation

Even more confusion is injected into this case by the statement by this lessee-producer "that these are quasi-contractual actions governed by federal law - and that under federal law restitution must be made of benefits received in excess of lawful service rates." (P. 7) This, of course, constitutes an admission that the holding of the court of appeals is directly contrary to *Phillips Petroleum v. Texaco, Inc.*, 415 U.S. 124 (1974). But Gulf asserts that because federal law is applicable petitioners are not even entitled to a hearing before the trial court on the factual issue of third-party beneficiary. (P. 12) The lessee-producer group obviously cannot agree on what theory the court of appeals has decided upon and for this reason alone the decision should be reviewed by this Court in order to clarify the legal principles so that inferior courts are not misled by the unclear rulings of the court of appeals.

Brief of Landowners

The landowners argue that the intent in the helex contracts to benefit third parties is so clear no extraneous evidence is needed in view of the plain contractual language. (P. 8) They argue that the $2.00 per mcf benefit is so clear that it should in fact be $3.00 per mcf. But what those respondents are attempting to argue is that the indemnification clause of the contracts (7.5 in the National Helium contract, J.A. A626) is a price escalation provision rather than an indemnity provision. This contention has been thoroughly examined by both the Kansas trial court and the Oklahoma trial court and found to be factually unsound. (J.A. A100 and A400-401) In fact the court of appeals at one time endorsed this theory. (J.A. A436, but see Judge Doyle's Dissent A457) But on

retrial the Oklahoma trial court found that the price the government and Phillips negotiated was both fair and final and no one expected that the government would pay more than the actual price therein stipulated.

Nor should the Court be deceived about statements about a government monopoly over helium. The government never had a monopoly over helium as such. For many years the government was the only entity dealing with helium because its demand was so limited. After the demand increased, private industry became active and remains so to this day.

Memorandum for the United States

The United States which has been allied with the helex petitioners, has filed a response in which it states it does not oppose the Helex Group Petitions for Certiorari. While agreeing with the points raised by the Helex Group, it nevertheless questions whether two points raised in such petitions are worthy of certiorari. Initially, while agreeing that the lower court's third-party beneficiary determination in the contract with the Helex Group was probable error, it questions whether such error states any novel proposition of contract law or misconstrues a rule of law having widespread significance. Aside from the fact that the third-party beneficiary rule has never before been so applied, the real novelty is that a United States court would violate judicial procedures and principles involving fundamental notions of notice and fair play basic to and inherent in our judicial system. If the question of third-party beneficiary were not before the trial court, the helex petitioners obviously had no notice nor an opportunity to produce evidence on a question which results *ipso facto* in a minimum judgment against helex petitioners in excess of $40,000,000.00. It is dis-

concerting that the United States is unconcerned about a violation involving basic constitutional principles of due process. It should forcibly resist, where possible, any attempt to undercut constitutional principles whether they be committed by some municipal magistrate or by a United States court.

Secondly, we suggest that the position of the United States on the court of appeals' application of federal common law is not only incorrect but can also result in potential losses of hundreds of millions of dollars to the United States and its taxpayers.

The court of appeals in *Ashland* justified the application of federal common law by stating that there existed "claims made by a multitude of interests owners from many states relating to production from Kansas, Oklahoma and Texas." (J.A. A450) The fact is in that case there was only one claimant, Ashland, and its claims involved only 18 wells, all located in Texas.

The court of appeals did not apply federal common law in assessment of prejudgment interest in order to have uniformity among several state laws. There was no showing that the laws of the several states were different on this point. The court simply held that since the United States had entered into contracts to purchase this one commodity and it obtained possession before title questions were resolved, the petitioners and the United States must pay prejudgment interest *notwithstanding any state law to the contrary.*

Thirdly, we point out that the United States purchases thousands of commodities including food, grain and lumber grown and processed in many different states. Obviously the federal courts do not establish a new body of federal common law involving each of these acquisitions.

There is nothing in the acquisition of helium that should require any different treatment. Clearly, there is nothing in the Helium Act Amendments, 50 U.S.C. 167, et seq. that require imposition of federal common law.

Finally, we suggest that if the potential liability of the United States is so great as its brief suggests as to justify the imposition of federal common law then surely it is sufficient to justify review by this Court.

CONCLUSION

It is noteworthy that none of the respondents addressed the issue raised by petitioners that the use of work-back as the exclusive means of determining value is too narrow and restrictive as a rule for determining value in the federal courts. Surely such issue cannot be frivolous inasmuch as Judge Doyle vigorously dissented on this point in *Ashland I.* (J.A. A456) For this reason and other reasons stated above, the respondents have failed to demonstrate any sound reasons why this case should not be reviewed and, therefore, the Petitions should be granted.

Respectfully submitted,

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May, 1982